Court, U.S.
FILED
JUL 27 1982
ALEXANDER L. STEVAS,
CLERK

82 No. 154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WANDA BRANDSTETTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

MARTIN J. MURPHY*
SHEILA M. MURPHY
JOHN PATRICK MICHAEL MURPHY
THE MURPHY LAW FIRM
10540 S. Western Avenue
Chicago, Illinois 60643
(312) 779-9845
Attorneys for Petitioner

Pro Bono Publico:
DAVID GOLDBERGER
KATHRYN HALLER
RHONDA RIVERA
1659 N. High Street
Columbus, Ohio 43210

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether the Illinois bribery statute upon which petitioner's conviction is based is unconstitutionally vague and overbroad, in violation of the First Amendment.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	17

LIST OF AUTHORITIES

CASES:

Buckley v. Valeo, 424 U.S. 1 (1976)	11
Connally v. General Construction Co., 265 U.S. 385 (1926)	11
Gooding v. Wilson, 406 U.S. 518 (1972)	12
International Society for Krishna Consciousness v. Rochford, 585 F.2d 263 (7th Cir. 1978)	14
Shelton v. Tucker, 365 U.S. 479 (1961)	12
Smith v. Goguen, 415 U.S. 566 (1974)	11
United States v. Arthur, 544 F.2d 730 (4th Cir. 1976)	15

CONSTITUTIONAL PROVISIONS:

First Amendment to the Constitution of the United States 11, 16

STATUTES:

Ill. Rev. Stat., Ch. 38, sec. 33-1 ..... 11, 12, 15, 16
Ill. Rev. Stat., Ch. 38, sec. 90-1 15
Ill. Rev. Stat., Ch. 127, secs. 601-609 16

OTHER AUTHORITIES:

Webster's Third New International Dictionary 13

In The

Supreme Court of the United States

October Term, 1981

WANDA BRANDSTETTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH JUDICIAL DISTRICT

Petitioner, Wanda Brandstetter, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, Fourth District, entered on May 28, 1982.

OPINIONS BELOW

The opinion of the Appellate Court of Illinois is reported as *People v. Brandstetter*, 103 Ill. App. 3d 259, 58 Ill. Dec. 699, 430 N.E. 2d 731 (Fourth Dist. 1982), and is included as Appendix A to this Petition. The order denying the Petition for Leave to Appeal to the Illinois Supreme Court issued was entered on May 28, 1982, is not officially reported and appears as Appendix B.

JURISDICTION

The judgment and opinion of the Appellate Court of Illinois, Fourth District was entered on January 8, 1982. No Petition for Rehearing was filed in the Illinois Appellate Court. An order denying the Petition for Leave to Appeal to the Illinois Supreme Court was denied on May 28, 1982, and this Petition for Certiorari was filed within 60 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(c).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTES INVOLVED

Ill. Rev. Stat., ch. 38, sec. 33-1(a):

A person commits bribery when:

(a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or

* * *

Ill. Rev. Stat., ch. 38, sec. 90-1:

1. No member of the General Assembly shall accept or receive, directly or indirectly, any money or other valuable thing, from any corporation, company or person, for any vote or influence he may give or withhold on any bill, resolution or appropriation, or for any other official act.

STATEMENT OF THE CASE

In the Spring of 1980, Illinois was one of the remaining States and the only major industrial state which had not yet ratified the Equal Rights Amendment. The question of ratification came up again before the Illinois Legislature in the form of House Joint Resolution Constitutional Amendment No. 1.

During the several days preceding May 14, when the Legislature was to vote on the question, there were efforts by both sides to persuade undecided legislators to vote for or against the amendment. The President of the United States, Jimmy Carter, called Representative Monroe Flinn, who was opposed to the Equal Rights Amendment, in Cahokia, and attempted to influence him to vote in favor of the Equal Rights Amendment. Monroe Flinn told the President that he had accepted campaign contributions from STOP ERA and believed that it would be less than honest to switch. (Defense offer of proof, Vol. IV pp. 111-15) Phyllis Schlafly, Chairman of STOP ERA, accused the President of near bribery in calling representatives and offering federal benefits in exchange for pro-ERA votes. (Defense offer of proof, Vol. IV, p. 114)

During that period of time it was generally known through the State, according to what Representative Gary Hannig told defense counsel, that STOP ERA was giving a minimum of $300 and a maximum of $2,000 to every representative who either voted against ERA or did not vote, (Defense offer of proof, Vol. IV, pp. 115-16) In fact, since 1978 the STOP ERA PAC had distributed more than $100,000 to Illinois legislators. (Vol. IV, p. 121)

Petitioner, a 54 year old mother and wife, with a Ph.D. degree in biology, had worked for passage of the Equal Rights Amendment since 1972, and had been very active for the past two years as a volunteer worker for the National Organization for Women (NOW). (R. Vol. VIII, pp. 8-14)

During the week prior to May 14, 1980, petitioner attended a meeting at the Equal Rights Ratification Project in Chicago. Sheila Clark, President of Illinois National Organization for Women, spoke at the meeting and told those present which legislators were undecided as to passage of the Equal Rights Amendment. One of those mentioned by Sheila Clark as undecided was Representative Nord Swanstrom, the Legislator named in the indictment and to whom petitioner later spoke, who had never voted on the Equal Rights Amendment. (Vol. VIII, pp. 21-22)

In anticipation that there would be a vote on the ERA bill on May 14, petitioner, in the company of several other men and women, traveled to Springfield. Later in the day, petitioner went to the rotunda, where there were perhaps 400 to 500 people. There, petitioner saw and spoke with Rep. Nord Swanstrom. (Vol. VIII, pp. 22, 51-55)

Representative Nord Swanstrom, a Republican whose district lies in the Northwest corner of the state near the Wisconsin and Iowa borders, had pledged after he received the nomination that he would vote against the Equal Rights Amendment. (Vol. VI, pp. 142, 160, 178) During the next three months Swanstrom received a total of $1,800.00 from the STOP ERA PAC. (Vol. VI, pp. 161-56)

Defense witnesses at trial, however, testified that Swanstrom told them in the Spring of 1980 that he was

undecided about ERA. Sheila Clark, the Illinois President of NOW, testified that Swanstrom told her his problem with ERA was not philosophical, but political, and that he did not really believe that the people of his district supported ERA. Sheila Clark offered to send in fund-raising experts if he voted for ERA. (Vol. III, pp. 189-90)

State Representative Goudyloch (Giddy) Dyer, a Republican from DuPage County, testified that during the two weeks preceding the vote, Swanstrom gave every indication of a person who was about to change his mind on ERA, and she told him that if he voted for ERA, there would be people in his district who would support him for re-election. (Vol. VII, pp. 176, 179) Swanstrom, however, claimed at trial that he had been opposed to ERA for several years and had never wavered in that stance. (Vol. VI, pp. 179-81)

In any event, organized groups in favor of ERA, who kept track of votes as absolutely solid "yes", or "no", or "maybe", began to place Swanstrom in the "maybe" column, and this became "general knowledge" among those working actively for ERA. (Vol. VII, pp. 204-5)

Petitioner testified at trial that when she approached Representative Nord Swanstrom in the rotunda, she gave him a card identifying herself as a field organizer for NOW and told him she could give him a month of her life and raise funds up to $1,000.00 in his district to offset the loss of STOP ERA contributions if he would vote his conscience on the issue. (Vol. VII, p. 159) Swanstrom did not recall this conversation. (Vol. VI, p. 197)

Later Swanstrom again returned to the rotunda, and petitioner testified that she saw her card fall to the floor. Petitioner testified that she listened to Swanstrom for a while and then stood back far enough from the crowd to be able to write something on one of her

calling cards. Petitioner testified that she was trying to restate what she had already said to him in words, but could not put so many words on a card. She heard Mr. Swanstrom say "I have to get back to the floor," and felt that she was running out of time. Petitioner testified that she couldn't finish what she wanted to say and wrote very quickly the following message: "Mr. Swanstrom: The offer for help in your election and $1,000 for your campaign for pro-ERA vote." (People's Exhibit No. 1) (C. 444) Petitioner testified that she handed the card to Swanstrom just as he started walking toward the Assembly Floor and called after him "Mr. Swanstrom, whatever you do—vote your conscience." (Vol. VIII, p. 25-30)

Representative Swanstrom read the card and put it in his pocket. The next day he showed it to a fellow Republican and the House Minority Leader, who called the Director of the Department of Law Enforcement. (Vol. VI, pp. 151-52, 199, 212-13)

Meanwhile, also on May 14, while intensive lobbying was going on for and against the Equal Rights Amendment, Phyllis Schlafly, Chairman of the STOP ERA organization who was also in Springfield that day, wrote a note to Representative Gary Hannig, who had already received $300 from STOP ERA, but who, according to news reports, had been offered $10,000 to switch his vote to "Yes" on ERA. (Vol. I, C. 80) The note referred to a fund raising advertisement that had been jointly sponsored by the Moral Majority and STOP ERA to defeat the Equal Rights Amendment and said, "Gary —STOP ERA has tremendous strength in your area. We had great returns from the 1-day anti-ERA ad. Stand firm and we will stand with you—Phyllis Schlafly." (Defense offer of proof Exhibit No. 3, C. 418) (Vol. IV, p. 132; Vol. IX, pp. 92-93) (This note was later

turned over to defense counsel prior to trial by the Court as additional discovery.) Phyllis Schlafly has never been prosecuted for bribery or legislative misconduct. Also on May 14 or 15 Phyllis Schlafly, in statements to the news media, called for grand jury investigations of the conduct of President Carter and Chicago's Mayor Jane Byrne. (Defense offer of proof, pp. 132-33, Vol. I, C. 81)

A few days later two investigators from the Department of Law Enforcement posing as agents of Representative Swanstrom visited petitioner at her home and asked for the $1,000.00. (Vol. VII, pp. 215-20) Petitioner told them that she intended to raise the money in Swanstrom's district and was willing to work for him if he would vote his conscience on ERA. Petitioner also said she was not involved in bribes or graft and wanted to talk to Swanstrom personally to clear this up. (Vol. VIII, pp. 34-35)

On June 5, 1980, the State's Attorney presented a proposed indictment, charging Wanda Brandstetter with bribery and solicitation of legislative misconduct, to the Sangamon County Grand Jury in Springfield. A grand juror asked whether Swanstrom was not offered help in his campaign from others in conversations throughout this time, and Swanstrom answered that the pro-ERA people offered to send fund-raising experts and bodies to distribute literature, but he thought there was nothing wrong with that because anybody can contribute to a campaign. There were several more questions relating to the lack of any difference between offering money and offering campaign assistance. (Supp. R. 15, 16-18)

> GRAND JUROR: Well—but it—I guess what I'm trying to do is equate the two in saying I don't see much difference in offering you $1,000 for your campaign and offering you ten bodies to come in and produce a—.

MR. ROBERTS: I don't think he's saying that there would be ten bodies if he voted for it.

They're saying—well, tell him what—.

THE WITNESS: Well, they're making general statements. We'll give you some help—.

GRAND JUROR: Well, it seems like an offer of something to enhance you in public office, to help you to stay there.

THE WITNESS: But not on the day of a vote an hour before it's going to be called.

GRAND JUROR: On, I guess I'm trying to understand. Maybe you can explain it to me, the difference between—.

THE WITNESS: I can't explain the legalities between the—.

GRAND JUROR: —between offering you money—it seems to me they're both help for your vote.

Besides, why would they be in there on May 14 offering you help in your November election? And that will help you if you can get the people to come up and help—tell—give you expertise on raising funds, wherever that may come from.

It seems to me they are in fact offering you something else.

Why isn't this brought to the grand juries too?

Maybe you can explain it for me.

MR. ROBERTS: Well, okay. My understanding is that the other offers of help were—were general.

They're not particularly demonstrable that—you know—it—it may well be implied that for their help for his vote they will offer help.

But it's not specific as this is—or as I suggest this may be, $1,000 for a pro-ERA vote.

And you're absolutely correct. There is a very fine line here.

A few moments later, a grand juror continued to state that he was having difficulty finding a line between offering $1,000 and offering a lot of bodies to come out and help. He continued:

• • •

> And there seems to me to be—you know—why—it seems to me there ought to be other people involved in the thing, and there ought to be charges on that if there is—the same thing.
> THE WITNESS: Go ahead.
> MR. ROBERTS: I think right now—and I can see what you're saying—but I think your job at this point to determine whether or not this conduct was over the line.
> GRAND JUROR: Doesn't the fact that you have this actually in writing make a big difference? Because these other people just talked to you. They didn't give you anything in writing, did they, that said we'll—you know—support your campaign? (Supp. R. 20)

The grand jury returned an indictment charging petitioner with bribery, in violation of Ill. Rev. Stat., Ch. 38, Sec. 33-1(a), and solicitation to commit legislative misconduct, in violation of Ch. 38, Sec. 90.

A motion to dismiss the indictment on the grounds that the statute was an unconstitutional limitation on freedom of speech was denied.

Following a jury trial petitioner was found guilty of bribery but not guilty of solicitation to commit legislative misconduct.

On appeal petitioner contended, *inter alia*, that the Illinois bribery statute, as written and as applied to petitioner, violated the Freedom of Speech Clause of the First Amendment. The Appellate Court of Illinois, Fourth District, rejected this argument and affirmed petitioner's conviction, saying: "while, as we subsequently set forth, we do not agree, we recognize that her conduct differed only subtly from that which is either statutorily permitted or constitutionally protected." (Appendix, p. 2) A petition for leave to appeal to the Supreme Court of Illinois was denied on May 28, 1982.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because the Illinois bribery statute is unconstitutionally vague and overbroad and in any event is unconstitutional as applied to petitioner's activities. Petitioner was convicted of bribery under a statute which is so vague that it fails to give notice of which specific lobbying activities are unlawful and which are protected by the First Amendment to the United States Constitution.

It is fundamental that criminal statutes must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course of conduct one may lawfully pursue. *Connally v. General Construction Co.*, 265 U.S. 385, 393 (1926). And where First Amendment rights are at stake, even more stringent requirements apply. This Court has stated that the vagueness doctrine:

> requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts. *Smith v. Goguen*, 415 U.S. 566, 572-574 (1974).

Since we deal with a First Amendment issue, lobbying, *Buckley v. Valeo*, 424 U.S. 1 (1976), application of the vagueness doctrine to the terms of §33-1(a) requires careful scrutiny of the statute's provisions.

The overbreadth doctrine which requires the invalidation of sweeping statutes such as §33-1(a) has been articulated clearly and repeatedly by the United States

Supreme Court. Thus in *Shelton v. Tucker*, 365 U.S. 479, 488 (1961) the Court stated:

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be achieved by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton v. Tucker*, 364 U.S. 479, 488 (1961).

In *Gooding v. Wilson*, 406 U.S. 518 (1972), the Supreme Court articulated the overbreadth doctrine even more forcefully.

> The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). Even as to such a class, however, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," *Speiser v. Randall*, 357 U.S. 513, 525 (1958), "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom," *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

Application of these principles leads inevitably to the conclusion that the statute is unconstitutionally vague and overbroad.

The bribery statute upon which the indictment was based, Ch. 38, sec. 33-1(a), provides as follows:

> "A person commits bribery when: (a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept;"

The phrase "property or personal advantage" can have a variety of meanings in the political and legislative context. According to *Webster's Third New International Dictionary*, "advantage" is defined as:

> the quality or state of being superior: a more favorable or improved position or condition . . . benefit, profit or gain of any kind . . . a factor or circumstance that gives superiority to its possessor or that puts him or it in a favorable or improved position . . .

Thus virtually anything which might confer a benefit or improved position qualifies under the terms of the statute.

For example, a public official can accept property, i.e., campaign posters, yet the terms of the statute appear to prohibit the acceptance of those posters. Other examples of the things which might qualify as property or personal advantage are innumerable. Does the production and tender of campaign posters or leaflets to support the legislators who have taken an affirmative stand on ERA constitute property? Does a public election endorsement of a legislator by a leader of the women's movement in return for a pro-ERA vote confer a "personal advantage?" When a lobbyist takes the check at dinner with a legislator following a favorable ERA vote, is property or personal advantage conferred? When the President of the United States or the Mayor of Chicago puts pressure on a legislator, is property or personal advantage conferred? One can think of similar uncertainties *ad infinitum*.

The statute also forbids the tender of property or personal advantage which a legislator "is not authorized by law to accept." The inherent vagueness of this phrase was recognized by the United States Court of Appeals for the Seventh Circuit in *International Society of Krishna Consciousness v. Rochford*, 585 F.2d 263 (7th Cir. 1978) where the Court of Appeals invalidated a prohibition of activities by individuals unless "authorized by law." The Court found the law to be unconstitutionally vague:

> Of more serious concern is the inclusion of the phrase "persons authorized by law" in the regulations. The court below found the words ambiguous. The City contends that the phrase need not be defined in the regulations because its meaning is clear; persons authorized by law are those who take part in protected First Amendment activities. We are unpersuaded. By not explaining who is "authorized by law," the regulations are deficient. Persons of common intelligence would be required to guess at the phrase's meaning and differ as to how the regulations should be enforced. *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). The language implies that there also are persons who are not authorized by law to distribute literature or solicit contributions. Yet the regulations contain no guidelines to assist either the person who wishes to determine whether he is authorized by law or the official who is charged with the regulations' enforcement. (585 F.2d at 268).

A defendant's right to specific notice of the charges against him in his indictment for conduct "forbidden by law" must extend to the statute as well, otherwise the "forbidden by law" language or the "not authorized by law" language leaves the volunteer public interest lobbyist without guidelines as to what conduct is forbidden and what conduct is protected.

What offer of support could petitioner make that was not "authorized by law?" The prosecution did not include a reference to any provision of Illinois law in Count I of the indictment of this case. The section of the criminal code which the trial court concluded was applicable was §90-1 which defines legislative misconduct. However, the jury did not agree that the legislative misconduct law governed petitioner's offer of campaign support because it acquitted her of the charge of violating it. If the judge and jury could not agree on what kind of an offer of campaign help is "not authorized by law," how could petitioner have known ahead of time?

The grand jury in this case was equally confused as indicated by the questions put to the prosecutor. And if the grand jurors were confused, how could petitioner be expected to understand the law.

Even if the "not authorized by law" provision of §33-1(a) can be interpreted to include legislative misconduct as defined in §90-1 of the Illinois Criminal Code, §33-1(a) remains overbroad. Construed most narrowly, both sections broadly prohibit offers of political support contingent upon official acts or votes. Therefore, both §33-1(a) and §90-1 so interpreted could extend to cover an enormous range of protected activity because most if not all political support of legislators is based upon positions taken in votes on legislation.

> No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976).

Finally, §33-1(a), is overbroad because it governs lobbying "with intent to influence" legislators and other public officials. Webster's Third International Dictionary states that "influence" is defined as follows:

> to affect or alter the conduct, thought or character of by indirect or intangible means; . . . to have an effect on the condition or development of . . . .

Such a term covers the mental state of virtually everyone who communicates with a legislator about the legislative process to try to persuade the official on any issue. Any such person thus wishes to "have an effect on the condition or development of" the legislator's decision insofar as he or she can.

The overbreadth of §33-1(a) is emphasized by the fact it is in conflict with the Illinois Governmental Ethics Act, Ch. 127, §601-609. In its sweep, it is being applied to a citizen like petitioner who supports the Equal Rights Amendment as a matter of principle and offers campaign assistance in the hope of furthering that principle. She stands to receive *no* tangible personal benefit either from the passage of ERA or from the offer of support she made to Swanstrom. Rather she, like other ERA supporters, believes an amendment to the United States Constitution is necessary to better the status and condition of all women in the State of Illinois and the United States.

The Illinois Appellate Court did not deal effectively with these issues. The lower court concluded that petitioner's offer violated the statute because it was an offer of money in exchange for a specific official Act—i.e., a vote. The Court even seems to imply that an offer of campaign services in exchange for a specific vote would violate the statute—a position which petitioner contends is definitely in violation of the First Amendment. But why distinguish between money and services or other "favors"? Do legislators themselves violate the bribery statute by exchanging votes or engaging in "log rolling"?

Since numerous other activities regularly engaged in by lobbyists and legislators are not constitutionally distinguishable from the act of petitioner, her conviction is an egregious violation of the First Amendment right to Freedom of Speech.

CONCLUSION

For these reasons, we respectfully request that this petition for certiorari be granted.

Respectfully submitted,

MARTIN J. MURPHY*
SHEILA M. MURPHY
JOHN PATRICK MICHAEL MURPHY
THE MURPHY LAW FIRM
10540 S. Western Avenue
Chicago, Illinois 60643
(312) 779-9845
Attorneys for Petitioner

Pro Bono Publico:
DAVID GOLDBERGER
KATHRYN HALLER
RHONDA RIVERA
1659 N. High Street
Columbus, Ohio 43210

* Counsel of Record

APPENDIX A

No. 16801
IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
[Filed January 8, 1982]

THE PEOPLE OF THE STATE OF ILLINOIS, *Plaintiff-Appellee,* v. WANDA BRANDSTETTER, *Defendant-Appellant.*	Appeal from Circuit Court Sangamon County 80-CF-321 Honorable Jeanne Scott, *Judge Presiding.*

Mr. PRESIDING JUSTICE GREEN delivered the opinion of the court:

After a trial by jury in the circuit court of Sangamon County, defendant, Wanda Brandstetter, was convicted on August 22, 1980, of the offense of bribery (Ill. Rev. Stat. 1979, ch. 38, par. 33-1(a)). On November 7, 1980, she was fined $500 and placed on conditional discharge requiring her to perform 150 hours of public service work. The case arose from an occurrence on May 14, 1980, in Springfield, when, pursuant to conversations concerning the proposed Equal Rights Amendment to the Federal Constitution (ERA), defendant handed to State Representative Nord Swanstrom a note on which was handwritten: "Mr. Swanstrom the offer for help in your election & $1000 for your campaign for Pro ERA vote." She has appealed. We affirm.

Although defendant makes numerous claims of error, the major thrust of her argument is that even construing the evidence most strongly against her, she was acting pursuant to her first amendment rights of freedom

of speech to petition her government for redress of grievance. She maintains she did not violate any statute but, if she did, that statute was unconstitutional, at least as applied to what she was doing. While, as we subsequently set forth, we do not agree, we recognize that her conduct differed only subtly from that which is either statutorily permitted or constitutionally protected. Much evidence was offered and argument made that defendant was a well-meaning person of high moral character. While this did not exonerate her, it was properly reflected in the very light sentence which was imposed.

Defendant's contentions on appeal are, in more detail, as follows: (1) The legislation under which she was convicted was unconstitutional because of vagueness and overbreadth and as applied to the facts of this case; (2) her guilt was not proved beyond a reasonable doubt; (3) the indictment was insufficient; (4) the trial court erred in denying her an evidentiary hearing on her claim of discriminatory prosecution; (5) the verdict finding her guilty of bribery was legally inconsistent with that acquitting her of solicitation; (6) the prosecutor's closing argument deprived her of a fair trial; and (7) the trial court erred in denying her motion to vacate her conviction on the grounds of newly discovered evidence.

Although the details of the trial evidence will be discussed in connection with the various issues, a brief reference to some of the evidence is necessary to begin that discussion. Defendant testified to having become an active volunteer for ERA in 1978 and to having traveled to Springfield on May 14, 1980. She stated that she had previously been informed that Swanstrom had been against ERA but was wavering. She testified to two encounters with Swanstrom on May 14, 1980. In the first one she told him she would spend a month in his district working for him and would raise up to $1,000 for him if he would support ERA. She said she told him he should have funds from both sides of the ERA issue so he could vote his conscience. She said she then handed him a card but he did not respond and later threw the card on the floor. Defendant further testified

that she later was standing by him while he was conversing with others and she handed him the note previously described, and as he walked off with it she told him "'whatever you do—vote your conscience.'" Defendant admitted at trial her offers were contingent upon Swanstrom's favorable vote on ERA, but stated she did not want him to vote for ERA if it was against his conscience. In his testimony, Swanstrom stated he did not remember defendant offering to work for him for a month or to raise money for him, nor did he remember her telling him to vote his conscience.

An understanding of the issues also requires an understanding of the charge upon which defendant was convicted and the statutes involved. The charge, which was by way of an information, alleged that on May 14, 1980, defendant:

> "with the intent to influence the performance of an act related to the employment and function of a public officer, Nord Swanstrom, Representative in the Illinois General Assembly for the Thirty-fifth (35th) Legislative District, tendered to Nord Swanstrom personal advantage and property, to wit: $1,000 to his campaign for his vote in favor of House Joint Resolution Constitutional Amendment #1 (The Equal Rights Amendment) which personal advantage and property Nord Swanstrom is not authorized by law to accept, in violation of the Criminal Code of 1961, as amended, Section 33-1a."

Section 33-1 of the Criminal Code of 1961 provides:

> "Bribery. A person commits bribery when:
>
> (a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person *any property or personal advantage which he is not authorized by law to accept.*" (Emphasis added.) Ill. Rev. Stat. 1979, ch. 38, par. 33-1(a).

Several other statutes are of significance. Section 1 of "AN ACT in relation to legislative conduct and prescrib-

ing penalties for the violation thereof. Laws 1965, p. 81, approved March 16, 1965, eff. July 1, 1965," states:

> "No member of the General Assembly shall accept or receive, directly or indirectly, any money or other valuable thing, from any corporation, company or person, for any vote or influence he may give or withhold on any bill, resolution or appropriation, or for any other official act." (Ill. Rev. Stat. 1979, ch. 38, par. 90-1.)

Section 3-101 of the Illinois Governmental Ethics Act provides:

> "No legislator may solicit, accept, or agree to accept, gifts, loans, gratuities, discounts, favors, hospitality, or services having an aggregate value of $100 or more in any calendar year from any one person known to have legislative interests, under circumstances from which it could reasonably be inferred that a major purpose of the donor is to influence him in the performance of his official duties.
>
> This section does not apply to (1) any political contribution, in cash or in kind, if such contribution is actually used for political purposes; (2) the purchase of tickets to, or advertisements in journals for, political or testimonial dinners; or (3) a commercially reasonable loan made in the ordinary course of business." Ill. Rev. Stat. 1979, ch. 127, par. 603-101.

Defendant maintains that section 33-1(a) is unconstitutionally vague because of the uncertain meaning of the words "property or personal advantage" and "authorized by law" as used in the statute. This court has previously stated:

> "*** A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law. (*Connally v. General Construction*

Co. (1926), 269 U.S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126, 127; *People v. Palkes* (1972), 52 Ill. 2d 472, 475, 288 N.E.2d 469, 471.) Moreover, a law fails to meet the requirements of due process if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is or is not prohibited in any given case." *People v. McPherson* (1978), 65 Ill. App. 3d 772, 775, 382 N.E.2d 858, 860.

Where a first amendment issue exists, a statute is required to possess a greater degree of specificity than in other contexts. (*Smith v. Goguen* (1974), 415 U.S. 566, 39 L. Ed. 2d 605, 94 S. Ct. 1242.) In *Buckley v. Valeo* (1976), 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612, the United States Supreme Court stated that the first amendment affords the broadest protection to the discussion of public issues and debate on the qualifications of candidates in order to "'assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people'." (424 U.S. 1, 14, 46 L. Ed. 2d 659, 685, 46 S. Ct. 612, ...) However, that court did not state directly whether lobbying involves an exercise of first amendment rights. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* (1961), 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523, the United States Supreme Court held antitrust legislation not to cover lobbying activity, stating that to do so would create a confrontation with first amendment rights. Because lobbying, as that term is used in the broad sense, was involved in the conduct giving rise to defendant's conviction, we examine section 33-1(a) in the light of the specificity required in first amendment cases.

In *People v. Kleffman* (1980), 90 Ill. App. 3d 1, 412 N.E.2d 1057, the court held the phrase "personal advantage" in section 33-3(c) of the Code (Ill. Rev. Stat. 1979, ch. 38, par. 33-3(c)) not to be unconstitutionally vague. That legislation defined one type of official misconduct as conduct by the official committed "[w]ith intent to obtain a personal advantage for himself or another."

The court described the phrase in the context of the statute to mean "an advantage to a particular person as opposed to the public the officer or employee serves." (90 Ill. App. 3d 1, 4, 412 N.E.2d 1057, 1061.) A Wisconsin bribery statute making similar use of the phrase "personal advantage" (Wis. Stat. Ann. 964.10) was held to be sufficiently specific. (*State v. Alfonsi* (1967), 37 Wis. 2d 469, 147 N.W.2d 550.) In *People v. Witzkowski* (1972), 53 Ill. 2d 216, 290 N.E.2d 236, one convicted of the offense of interference with a public institution of higher education in violation of section 21.2-2 of the Code (Ill. Rev. Stat. 1969, ch. 38, par. 21.2-2) claimed that statute to be void for vagueness. The charges arose from the defendant's participation in a sit-in protest in a public building. The supreme court upheld the statute saying:

> "Here the conduct described in the complaint leaves no uncertainty as to the nature of the conduct upon which the charge is based, and as we said in *Vandiver*, 'We will not *** conjecture as to the statute's application to situations less clear.' 51 Ill. 2d 525, 530, 283 N.E.2d 681, 684." 53 Ill. 2d 216, 220, 290 N.E.2d 236, 239.

In the instant case defendant was charged with tendering, with a certain mental state, "personal advantage and property, to wit: $1000 to [Nord Swanstrom's] campaign." This charge left no uncertainty as to the nature of that tendered to Swanstrom, namely $1,000 in money to be used in his campaign. We need not conjecture what "personal advantage" might mean in the context of other charges. Here, its meaning was sufficiently specific to meet the specificity required even when first amendment rights are at issue.

The meaning of the phrase "which he is not authorized by law" contained in section 33-1(a) relates to several of defendant's claims of error. In maintaining that the words lack specificity, she cites *International Society for Krisna Consciousness, Inc. v. Rochford* (7th Cir. 1978), 585 F.2d 263. An ordinance, whose validity was

in issue in that case, stated "[p]ersons authorized by law to distribute literature, or solicit contributions may do so only in public areas of Chicago airports." In holding the enactment void for vagueness, the court determined the language to be ambiguous because it implied there were persons who were not authorized by law to distribute or solicit, yet no guidelines had been provided to determine who those people were. The court further concluded that, under the circumstances, an airport official could make an arbitrary determination that one seeking to distribute or solicit was not authorized by law to do so anywhere within the airport and then impose a prior restraint on that person from doing so.

Section 3-101 of the Illinois Governmental Ethics Act (Ill. Rev. Stat. 1979, ch. 127, par. 603-101) places a limit on those things of value a legislator may receive personally from persons with a "legislative interest", when the legislator might reasonably infer a major purpose of the donor was to influence performance of his official duties.

The term "legislative interest" is defined as "a substantial economic interest, distinct from that of the general public, in one or more legislative matters." (Ill. Rev. Stat. 1979, ch. 127, par. 601-106.) We interpret the provision of the second paragraph of section 3-101, which states that the foregoing is inapplicable to campaign contributions properly used, to authorize by law a legislator to receive contributions for general campaign uses even though they are given for the purpose of influencing the legislator's performance of his official duties. However, we interpret the statutory prohibition against a legislator "directly or *indirectly*" (emphasis added) receiving things of value "for any vote ***" (Ill. Rev. Stat. 1979, ch. 38, par. 90-1) to prohibit a legislator from receiving a campaign contribution in exchange for an agreement to vote in a particular way."

We thus conclude that the Illinois statutory scheme defines with specificity "property or personal advantage" which a legislator is "authorized by law" to accept. By analogy, it is also clear that other public officials are

"authorized by law" to receive campaign contributions from those who might seek to influence the candidate's performance as long as no promise for or performance of a specific official act is given in exchange.

Our interpretation of the previously described legislation negates defendant's claim that section 33-1(a) of the Criminal Code of 1961 is overbroad. When legitimate governmental purposes tend to stifle individual rights or liberties, particularly those connected with the first amendment, and the same end can be achieved by less drastic means, the overbreadth doctrine requires that the less drastic means be used. (*Gooding v. Wilson* (1972), 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103; *Shelton v. Tucker* (1960), 364 U.S. 479, 5 L. Ed. 2d 231, 81 S. Ct. 247.) Defendant maintains that section 33-1(a) prohibits even an offer of campaign services by a prospective worker to a candidate if the worker had the intent to influence the candidate's performance of his duties. However, we conclude that section 33-1(a) does not do so as long as the candidate neither makes a promise to perform nor performs in consideration of the offer.

Defendant places major emphasis upon her contention that, at least as applied to the facts of this case, section 33-1(a) is unconstitutional. She maintains that (1) all campaign support offered to a candidate is constitutionally protected if offered for a "public interest" issue as opposed to a "private interest issue," and (2) any offer she may have made of a campaign contribution could not constitute bribery since it was coupled with an offer of campaign support. As this claim is limited to the facts of this case, we consider this issue in the light of our conclusion, later explained, that the evidence was sufficient here for the jury to have found beyond a reasonable doubt that defendant offered property to Swanstrom's campaign contingent upon his favorable vote for ERA. No statute can be used to punish constitutionally protected activity (*Watts v. United States* (1969), 394 U.S. 705, 22 L. Ed. 2d 664, 89 S. Ct. 1399). In order to avoid confrontation with first amendment rights, anti-

trust legislation has been considered not to cover lobbying activities (*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.* (1961), 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523). However, no showing was made there that the lobbying envisioned consisted of the making of a promise or tender of property in exchange for a vote or promise to make a vote. No cited cases there held that a lobbyist or other citizen has a constitutional right to do so.

Defendant's theory that offers of campaign support on behalf of a "public interest" issue should be treated differently than those on behalf of a "private interest" stems from section 1-109 of the Illinois Governmental Ethics Act which, for purposes of the Act, defines "lobbying" as follows:

> "'Lobbying' means promoting or opposing in any manner the passage by the General Assembly of any legislative matter affecting the interests of any individual, association or corporation as distinct from those of the people of the State as a whole." Ill. Rev. Stat. 1979, ch. 127, par. 601-109.

Section 3-101 of the Illinois Governmental Ethics Act also makes a distinction between the receipt of property by legislators from persons who have substantial economic interest in legislation and from those whose interest is only that of the general public. The evidence makes no showing defendant was a lobbyist but neither section purports to authorize any person, lobbyist or not, to promise or tender property to a legislator in exchange for a vote. Nor does any Illinois statute authorize a legislator to receive the same from any such person. The prohibition against that type of conduct is provided for by other legislation which makes no distinction as to the type of interest the donor may have in the legislation (Ill. Rev. Stat. 1979, ch. 38, par. 90-1). Thus, the laws of this State make some distinctions between the interest of those promoting legislation but the distinctions do not apply to all types of such promotion. We are aware of no authority that such distinction is constitutionally required.

Defendant's theory that because she also offered campaign help to Representative Swanstrom section 33-1(a) could not be used to punish her for also tendering property to him in exchange for his vote on ERA is based upon *Street v. New York* (1969), 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354. There a conviction for violation of a New York statute prohibiting desecration of the American flag was held to be invalid because the defendant's conduct in burning a flag was accompanied by the exercise of free speech in decrying the treatment that had been accorded Mr. James Meredith, a civil rights leader who had been shot by a sniper. The court concluded that the conviction could have been based upon the defendant's statements rather than the burning of the flag.

In *Street*, the charge made reference to the words of protest used by the defendant and the record of the bench trial did not reveal whether the judge had considered the words as part of the offense. Even assuming *arguendo* that all of defendant's spoken words here were constitutionally protected as an exercise of her first amendment rights, those words were not so intertwined with her offense as was the case in *Street*. The charge specifically set forth her conduct as the tender of the $1,000. The record fully indicates that she was tried on that theory. She produced the evidence of the offer of her campaign support and no argument was made that she should be convicted because of it. The conviction was not rendered invalid for this reason.

Defendant maintains the bribery charge was insufficient because it did not advise her how Swanstrom was "not authorized by law to accept" her alleged offer of $1,000 to his campaign. She relies upon *People v. Adams* (1978), 64 Ill. App. 3d 547, 381 N.E.2d 738, and *People v. Campbell* (1972), 3 Ill. App. 3d 984, 279 N.E.2d 123. In *Adams*, the defendant was convicted of a violation of section 33-3(b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1975, ch. 38, par. 33-3(b)) prohibiting a public employee from knowingly performing "an act which he knows he is forbidden by law to perform." The court

deemed the charge to merely state that the defendant had cut down a tree on private property with State equipment on State time. The court deemed the statutory requirement that the defendant knew he was forbidden to do the act to be crucial. The omission was held to render the charge insufficient even though raised for the first time on appeal. The court also noted that because the conduct alleged was forbidden by rule or regulation rather than statute, the charge should have set forth what the rule or regulation was which was violated. Similarly, in *Campbell*, the court held a charge under the same statutory provision to be erroneous because it failed to allege the defendant knew the conduct to be forbidden.

Under section 33-1(a) of the Code, knowledge by the defendant that the conduct is not authorized by law is not an element of the offense and need not be alleged. The impropriety arose not from rule or regulation but from statute (Ill. Rev. Stat. 1979, ch. 38, par. 90-1). Neither *Adams* nor *Campbell* is authority that the statute making the receipt of the property by the legislator unlawful need be set forth in the charge. In *People v. Clark* (1979), 71 Ill. App. 3d 381, 389 N.E.2d 911, a charge under section 33-1(a) did not even allege that the recipient of the property or personal advantage was not authorized by law to accept the same. The charge was held to be sufficient because the circumstances set forth in the charge clearly indicated that acceptance was unauthorized. Accordingly, we deem the charge here to have been sufficient.

The evidence was sufficient for the jury to have found defendant's guilt to have been proved beyond a reasonable doubt. Defendant's testimony supplied much of the proof. She admitted handing the card to Swanstrom which on its face offered him money for his campaign in exchange for a pro-ERA vote. She admitted the offer was contingent upon his vote in favor of ERA. Defendant places great emphasis on the fact that evidence indicated Representative Swanstrom was undecided as to his vote. If that had any bearing on whether defendant

committed the offense, it would be circumstantial evidence that defendant intended to influence his vote by the offer. Defendant also cites some evidence that she told Swanstrom she wanted him to vote his conscience. However, the jury could have disbelieved this testimony, particularly in view of defendant's testimony that her offer was contingent on his vote.

This case differs from *People v. Gokey* (1974), 57 Ill. 2d 433, 312 N.E.2d 637, where the court held that defendant's bribery conviction must be reversed because under the circumstances defendant's offer was hardly language seriously proposing criminal conduct. In the present case, defendant never contends that her offer was not serious and under the circumstances a jury could reasonably find the offer was serious.

The information charged that defendant "tendered" the money to Swanstrom. It did not use any form of the alternate word "promises" contained in the statute. Defendant makes a substantial argument that defendant did not tender Swanstrom $1,000. The evidence is undisputed that she had no money with her at the time, and the inferences from the circumstantial evidence were that the money would be delivered later. Within the context of contract law she may be correct.

The term "tender" is defined as follows:

> "An offer of money. The act by which one produces and offers to a person holding a claim or demand against him the amount of money which he considers and admits to be due, in satisfaction of such claim or demand, without any stipulation or condition. ***
>
> * * *
>
> The actual proffer of money, as distinguished from mere proposal or proposition to proffer it. Hence mere written proposal to pay money, without offer of cash, is not 'tender.'" Black's Law Dictionary 1315 (5th ed. 1979).

However, in *People v. Wallace* (1974), 57 Ill. 2d 285, 290, 312 N.E.2d 263, 266, the supreme court described the offense of bribery as occurring when the accused "promises or tenders to a public official" in the manner prohibited by the statute, and then stated, "The *mere offer* or promise with the requisite intent is sufficient to constitute the completed offense of bribery." (Emphasis added.) The court thus implied that an offer was sufficient to constitute a "tender." In *People v. Mostert* (1976), 34 Ill. App. 3d 767, 340 N.E.2d 300, the court cited the foregoing to refute the claim of a defendant that use of the word "tender" in section 33-1 rendered the law unconstitutionally vague. In upholding the trial court's refusal of an instruction offered by the defendant, the *Mostert* court held the issue to have been waived but also commented that the defendant's cases cited in support of the instruction were "concerned with 'tender' in a narrow contractual setting of mutual and concurrent promises, and, as such, [were] clearly distinguishable." (34 Ill. App. 3d 767, 770, 340 N.E.2d 300, 302.) We conclude that the legislature intended the word "tender" to be used in a sense much broader than its usage in contractual law and to include the offer made by defendant, although she was not shown to have in her possession the money offered.

Prior to trial the court denied defendant's request for an evidentiary hearing on her motion to dismiss the charges because of discriminatory selective prosecution. In support of her motion she made an offer of proof, the material substance of which was the following. Defense counsel stated that if called, David Epstein, parliamentarian of the House of Representatives and a lawyer of 12 years' experience, would testify that: (1) He is often called upon to give official and unofficial advice to members as to the propriety of conduct; (2) he had seen offers of contributions conditioned upon a vote similar to that attributed to defendant; and (3) in his opinion, citizens are not prohibited by section 33-1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 33-1(a)) from offering to pledge campaign contributions contingent upon a vote.

Defendant's counsel also stated that if called, Representative Gary Hannig would testify that: (1) He received a contribution of $300 from a group called Stop-ERA in March 1980; (2) House of Representative members generally knew Stop-ERA was giving from $300 to $2,000 per member to those who voted against ERA or did not vote on the issue; (3) he received from Stop-ERA Chairman Phyllis Schlafly a note over her signature which stated:

> "STOP ERA has tremendous strength in your area. We had great returns from the 1-day anti-ERA ad. Stand firm and we will stand with you—"

Defense counsel also stated he would ask Representative Hannig whether, as stated on police reports, he was offered $10,000 to vote for ERA. Defendant also offered to show that Representative Swanstrom had contacted the Speaker of the House of Representatives about defendant's approaches to him and that they had gone to the Department of Law Enforcement prior to contacting the State's attorney of Sangamon County.

In *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064, the Supreme Court found equal protection was violated where a county board, having unlimited discretion to grant operating licenses to laundries located in wooden buildings, granted those licenses only to laundries operated by Caucasians and denied them to those operated by Chinese. In *Oyler v. Boles* (1962), 368 U.S. 448, 7 L. Ed. 2d 446, 82 S. Ct. 501, the prohibition against such denial of equal protection of law was extended to the prosecution of criminal cases. The court required that for an accused to invoke a defense based on that theory, he must show not only selectivity but also the application by law enforcement officials of an unjustifiable or impermissible standard in making the selection.

In *People v. Lewis* (1979), 73 Ill. App. 3d 361, 386 N.E.2d 910, defendants argued the trial court erred in denying, without an evidentiary hearing, their pretrial motions to dismiss the indictment based on discrimina-

tory prosecution. Defendants alleged that one of the bases for their selection, was their exercise of their first amendment rights of free speech and free association. The court stated:

> "The State may not deliberately base its decision to prosecute an individual on the constitutionally protected grounds of race, religion, or the exercise of first amendment rights. (*United States v. Falk* (7th Cir. 1973), 479 F.2d 616; *United States v. Berrigan* (3d Cir. 1973), 482 F.2d 171; *United States v. Steele* (9th Cir. 1972), 461 F.2d 1148.) However, there is a presumption that any prosecution for violation of the criminal law is undertaken in good faith. (*Falk.*) To overcome this presumption and to justify the holding of an evidentiary hearing, the burden is on the defendant to present sufficient facts to make out at least a *prima facie* case of improper discrimination. *United States v. Scott* (9th Cir. 1975), 521 F.2d 1188.
>
> 'This requires that appellant first demonstrate that others similarly situated generally have not been prosecuted for conduct similar to that for which he was prosecuted. Secondly, appellant must show that his selection was based on an impermissible ground such as race, religion or his exercise of his first amendment right to free speech.' *Scott*, 521 F.2d at 1195." (73 Ill. App. 3d 361, 364-65, 386 N.E. 2d 910, 914.)

The court there found defendants' motion satisfied the first requirement by stating facts which indicated that others were not criminally prosecuted for their conduct but the motion did not meet the second requirement, as there was no showing that the selection for prosecution was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

Here, on the other hand, defendant has offered evidence sufficient to show that she was part of a group protected because they were exercising their first amendment rights in support of ERA. She has not offered to

show that substantial evidence exists that designated others, not part of her group, were offering campaign contributions in exchange for a vote. Evidence that ERA opponents were offering contributions to legislators and sent one of them a note indicating they had "great returns" from an advertisement, admonishing him to "stand firm" and they would "stand with" him was not of such caliber to support prosecution.

The proffered testimony of the parliamentarian of the House of Representatives had little probative value on the issue of selective prosecution. Whether the law permits a legislator to receive a campaign contribution conditioned upon an agreement to vote in a particular way and whether a citizen may offer such a contribution was a question of law for the court. Moreover, the issue of selective prosecution concerns the failure of the State to prosecute others who may be guilty and not the prosecution of those who are not guilty. Evidence that the parliamentarian may have been giving good faith advice to legislators that offers similar to that found to have been made by defendant here may be legally accepted, would be insufficient to prove that to the knowledge of the prosecutor this had happened in particular cases.

Because of the insufficiency of evidence against others, this case differs from *United States v. Steele* (9th Cir. 1972), 461 F.2d 1148. There a defendant, who was convicted of refusing to answer the questions on the census form, claimed he had been singled out for prosecution because he had publicly advocated noncompliance with census requirements. Defendant showed that at least six others had committed the same offense and were not prosecuted. The reviewing court concluded that the names of these six should have been known through the information gathering system used in the census. A special background dossier had been prepared on defendant by census technicians. The court stated that the government is not obligated to prosecute all offenders, but no effort was made by the government to justify the prosecution of defendant as a result of random selectivity. The only plausible explanation for that

defendant's prosecution was his explanation that he was being discriminated against.

We deal summarily with defendant's remaining claims. In addition to the charge for which she was convicted, defendant was charged with, but acquitted of, solicitation of legislative misconduct (Ill. Rev. Stat. 1979, ch. 38, par. 90-1). She claims the verdicts were inconsistent. We need not examine her claim for neither the legal nor logical inconsistency between verdicts of conviction and acquittal in the same case vitiate the verdict of conviction if it is properly supported by the evidence. *People v. Dawson* (1975), 60 Ill. 2d 278, 326 N.E.2d 755; *People v. Murray* (1975), 34 Ill. App. 3d 521, 340 N.E.2d 186; see, also, *People v. Barker* (1979), 78 Ill. App. 3d 686, 397 N.E.2d 552.

Once during closing argument, the prosecutor argued to the jury that the prosecution was not seeking "prison" for defendant but was asking for a conviction. An objection was sustained, and the court informed the jury that only the court had sentencing power. As candidly admitted by the prosecutor, the remark was improper. (*People v. Klapperich* (1939), 370 Ill. 588, 19 N.E.2d 579.) However, the defendant improperly implied in argument that the prosecution was a politically motivated charade designed to single out an innocent defendant for improper aims. Under the circumstances, the remark was not reversible error. Defendant's post-trial motion based on newly discovered evidence was properly denied. The new evidence claimed was cumulative to immaterial matter offered at trial. *People v. Jones* (1975), 26 Ill. App. 3d 78, 325 N.E.2d 56.

For the reasons stated, we affirm.

Affirmed.

WEBBER and TRAPP, JJ., concur.

APPENDIX B

ILLINOIS SUPREME COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

H. Wayne Russell
Clerk

May 28, 1982

Ms. Sheila M. Murphy
Attorney at Law
10540 S. Western Ave.
Chicago, IL 60643

No. 56309—People State of Illinois, respondent, vs. Wanda Brandstetter, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ H. WAYNE RUSSELL
Clerk of the Supreme Court

Office - Supreme Court, U.S.
FILED
OCT 14 1982
ALEXANDER L. STEVAS
CLERK

No. 82-154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WANDA TRANDSTETTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
Assistant Attorney General
188 West Randolph Street, Suite 2300
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Respondent

TERENCE M. MADSEN
Assistant Attorney General
Of Counsel

Printed by the Authority of the State of Illinois

QUESTIONS PRESENTED

Whether the Illinois bribery statute defines the offense with sufficient specificity to have allowed the petitioner to have determined that offering a campaign gift of one thousand dollars ($1,000.00) to a legislator, where the offer of cash is conditioned, wholly, on a favorable vote on a single House Resolution, is a violation of Illinois law.

Whether the Illinois bribery statute is so overbroad that it has a chilling effect on the rights of Illinois citizens to petition their legislature.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT:	
I.	
The Illinois Bribery Statute Defines The Offense With Sufficient Specificity To Have Allowed The Petitioner To Have Determined That Offering A Campaign Gift Of One Thousand Dollars ($1,000.00) To A Legislator, Where The Offer Of The Cash Is Conditioned Solely Upon A Favorable Vote On A Single House Resolution, Is A Violation Of Illinois Law	3
II.	
The Illinois Bribery Statute Is Not So Broad That It Has A Chilling Effect On The Rights Of Illinois Citizens To Petition Their Legislature	5
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	6, 7, 8
Connally v. General Construction Co., 265 U.S. 385 (1926)	4
Gooding v. Wilson, 405 U.S. 518 (1972)	6
Parker v. Levy, 417 U.S. 733 (1974)	4
People v. Brandstetter, 103 Ill. App. 2d 259, 430 N.E.2d 731 (4th Dist. 1982)	5
United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974)	7
Younger v. Harris, 401 U.S. 37 (1971)	6

Statutes

Ill. Rev. Stat. 1981, ch. 38, § 33-1(a)	3, 4
Ill. Rev. Stat. 1981, ch. 38, § 90-1	4, 7

In The

Supreme Court of the United States

October Term, 1982

WANDA BRANDSTETTER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

The respondent asks this Court to deny the Petition for Writ of Certiorari to review the judgment of the Appellate Court of Illinois insofar as petitioner fails to raise a significant question of constitutional proportion that is worthy of review.

OPINION BELOW

The opinion of the Appellate Court of Illinois is appended to the Petition for Writ of Certiorari.

JURISDICTION

The petitioner appears to have satisfied the prerequisites to jurisdiction established in 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions involved are set out in full on pages 2 and 3 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Because the respondent takes exception to the argumentative and, at times, misleading recitation of the facts found in petitioner's brief, this Court is referred to the Illinois Appellate Court opinion in this case for a more neutral factual narration. *See People v. Brandstetter*, No. 16801 (4th Dist. 1982), which is reprinted as Appendix A in the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

INTRODUCTION

The petitioner has been convicted of bribery. Although the conviction drew some national media attention because it involved the Equal Rights Amendment vote in Illinois, this case simply does not rise to the level of political significance with which the petitioner has attempted to color it. This case involves a simple case of bribery and is concerned only with the interpretation of the Illinois bribery statute.

The petitioner contends that the Illinois bribery statute, Ill. Rev. Stat. 1981, ch. 38, §33-1, is unconstitutionally vague and overbroad.

The respondent suggests that, even under the strictest construction, the statute is not so vague as to prevent petitioner from understanding that her conduct was proscribed, nor so overbroad as to cause a chilling effect on the legitimate exercise of rights secured through the First Amendment to the United States Constitution.

I.

THE ILLINOIS BRIBERY STATUTE DEFINES THE OFFENSE WITH SUFFICIENT SPECIFICITY TO HAVE ALLOWED THE PETITIONER TO HAVE DETERMINED THAT OFFERING A CAMPAIGN GIFT OF ONE THOUSAND DOLLARS ($1,000.00) TO A LEGISLATOR, WHERE THE OFFER OF THE CASH IS CONDITIONED SOLELY UPON A FAVORABLE VOTE ON A SINGLE HOUSE RESOLUTION, IS A VIOLATION OF ILLINOIS LAW.

The petitioner, quite properly, points out that it is a fundamental principle of constitutional law that a criminal statute must be so clearly expressed that a person of ordinary intelligence and experience can

reasonably determine whether a given course of conduct may be lawfully pursued. *See, Connally v. General Construction Co.*, 265 U.S. 385, 393 (1926). A vagueness analysis, however, is limited in scope to the effect of the statute on the specific conduct of the accused. The analysis is not concerned with marginal or hypothetical cases. *Parker v. Levy*, 417 U.S. 733 (1974).

In this case, the petitioner's course of conduct was to slip a note to a legislator offering him a one thousand dollar ($1,000.00) campaign gift wholly conditioned on a "pro-ERA vote." (C. 444) The note was nothing less than an offer of cash for a favorable vote on a specific piece of legislation.

This course of conduct is absolutely, and very clearly, proscribed by Illinois law which provides that:

> A person commits bribery when:
>
> (a) With intent to influence the performance of any act to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept."

Ill. Rev. Stat., 1981, ch. 38, §33-1(a).

Furthermore, Illinois law also provides that:

> No member of the General Assembly shall accept or receive, directly or indirectly, any money or other valuable thing, from any corporation, company or person, for any vote or influence he may give or withhold any bill, resolution or appropriation, or for any other official act.

Ill. Rev. Stat., 1981, ch. 38, §90-1.

The Appellate Court of Illinois, Fourth District, quite properly determined that these statutes provided adequate notice to allow the petitioner to reasonably understand that her conduct was prohibited.

The State of Illinois has an important and substantial interest in proscribing bribery of state legislators. The respondent respectfully suggests that the offer to give a legislator a substantial amount of cash in exchange for a certain vote on a specific piece of legislation is "bribery" in every sense of the term. The fact that the petitioner seeks to attach a noble political goal to her action does not justify the crime under the statute. Nor should it. There is no place in criminal law for an "end justifying the means" analysis.

The petitioner's claim of vagueness is clearly frivolous and is, therefore, not worthy of the expense of the valuable time and resources of this Court required to review the reasoned finding of the Appellate Court of Illinois on this question.

II.

THE ILLINOIS BRIBERY STATUTE IS NOT SO BROAD THAT IT HAS A CHILLING EFFECT ON THE RIGHTS OF ILLINOIS CITIZENS TO PETITION THEIR LEGISLATURE.

The petitioner next contends that the Illinois bribery statute is so overbroad, on its face, that it tends to stifle individual liberties protected by the First Amendment. In support of this position, the petitioner embarks on an exercise of the imagination, speculating loosely about potential First Amendment activities which may fall among the items prohibited by the statute. This speculation focuses on the phrases "property and personal advantage" and "authorized by law." (Petition at pp. 13-15) The petitioner's focus is made despite the narrow interpretation given these phrases by the Appellate Court of Illinois. *People v. Brandstetter*, 103 Ill. App. 3d 259, 264-65, 430 N.E.2d 731, 735-36 (4th Dist. 1982).

In general, a person who can be punished in a constitutional manner under a statute cannot challenge the law due to its possible unconstitutional application to others. It is true, however, that an exception to this rule has been carved out by this Court where the potential unconstitutional application to others involves rights which are protected by the First Amendment. *See, Gooding v. Wilson*, 405 U.S. 518 (1972). However, "The existence of a chilling effect, even on First Amendment grounds has never been considered a sufficient basis in and of itself for prohibiting state action." *Younger v. Harris*, 401 U.S. 37, 51 (1971).

> Just as the incidental chilling effect of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution.

Younger v. Harris, 401 U.S. at 51.

Moreover, the justification for a facial overbreadth approach decreases as the behavior in question moves from pure speech toward physical acts, especially where that conduct falls within the scope of an otherwise valid criminal law reflecting legitimate state interests in maintaining control over harmful, constitutionally unprotected actions. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

In commenting upon the nature of an overbreadth claim in the First Amendment area, this Court noted:

> Although such laws, if too broadly worded, may deter protected speech to some unknown extent,

> there comes a point where the effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. [citation omitted] To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Broadrick v. Oklahoma, 413 U.S. at 615.

In *Broadrick*, this Court upheld a state law prohibiting the solicitation or reception of political contributions by state civil servants. Since the law was not directed at particular political viewpoints, it was subject to a less exacting overbreadth scrutiny. Even though the statute could be susceptible to some improper applications, it would not be "discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute." 413 U.S. at 618.

The petitioner does not suggest that the state should not be permitted to prohibit the bribing of state legislators. Clearly such a position would be frivolous. *Cf. United States v. Brewster*, 506 F.2d 62, 77 (D.C. Cir. 1974). Rather, she argues that the statute may, in theory, be construed to punish other, innocent, activity.

The basic difficulty with defendant's position is that it ignores the statutory elements of the bribery offense. The statute does not prohibit offering help to a legislator in a re-election campaign, nor outlaw fund-raising or politically motivated contributions. Neither does the law restrict in wholesale fashion legitimate attempts to influence a state representative. Rather, when read in conjunction with the legislative misconduct section (Ill. Rev. Stat., ch. 38, sec. 90-1 (1979)), bribery merely punishes the offer of

property or personal advantage to a legislator in exchange for a vote on legislation when the offeror intends to influence the legislator's decision on how to vote. This proscription simply restricts the offer of a *quid pro quo* for a vote as a means of protecting the legislative process. Absent such a law, votes in the General Assembly could be sold to the highest bidder. As was stated in *Broadrick*, since the law seeks to regulate such conduct in a neutral manner without showing partiality to any political viewpoint, the overbreadth analysis is less exacting than in other contexts. And since the statute seeks to punish a range of conduct which the State has a strong interest to prevent, total invalidation of section 33-1 would be unwarranted based upon a fear of a *de minimis* chilling effect on marginal First Amendment rights. The People of the State of Illinois firmly contend that it is *their* right to protect themselves from "wholesale bidding" for votes in the Illinois General Assembly.

Moreover, the People of the State of Illinois respectfully suggest that, while citizens may have a First Amendment right to support legislative positions and, arguably, even to seek to influence the stand of public officials on those issues through general support or opposition, there is no right, constitutional or otherwise, to bargain monetary support as a *quid pro quo* for a specific vote on a specific piece of legislation. It is a very different thing to send a check for $1,000.00 to the campaign committee of a legislator who espouses a position that one favors than it is to confront a legislator in the capitol rotunda shortly before the vote on a bill for which one has an interest and offer the legislator a $1,000.00 campaign gift if, *and only if*, he votes a particular way. The former is healthy political involvement. The latter is a bribe—a bribe which threatens the integrity of the legislative process—a bribe which the People of the State of Illinois will not countenance.

The First Amendment is not threatened by the Illinois bribery statute. Nor, is legitimate political involvement of any kind.

This Court should reject the cry of "overbreadth" by this petitioner and reject her attempt to bring the bribery of state legislators within the definition of the protected exercise of First Amendment rights.

Neither the intent nor the spirit of the First Amendment would be well-served by granting this petition.

CONCLUSION

For these reasons, the People of the State of Illinois ask this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General, State of Illinois

MICHAEL B. WEINSTEIN
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Respondent

TERRENCE M. MADSEN
Assistant Attorney General
Of Counsel

October 12, 1982